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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FELICITA MELENDEZ,	:
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Plaintiff,	:
	:
vs.	:
	:
GERARDO RODRIGUEZ, VOLPE DEDICATED,	:
INC., and RITE AID HEADQUARTERS CORP,	:
	:
Defendants.	:
	:
-----X	

CIVIL NO.: 12-CV-8846 (PKC)

**DECLARATION OF JOSEPH P. NAPOLI IN SUPPORT OF PLAINTIFF’S SECOND
MOTION IN LIMINE TO PRECLUDE OR SUBSTANTIALLY LIMIT TESTIMONY OF
KEVIN GALBREATH AND USE OF RELATED EXHIBITS**

Joseph P. Napoli, an attorney duly admitted to practice law in the United States District Court for the Southern District of New York, deposes and swears as follows, upon information and belief as follows, under penalty of perjury:

1. I am associated with the law firm of Napoli Bern Ripka Shkolnik, LLP, attorneys for the Plaintiff herein. By virtue of my review of the files maintained by my firm for purposes of prosecuting the Plaintiff’s claims, I am fully familiar with the facts, circumstances and procedural history of this litigation.

2. This Declaration is respectfully submitted in support of Plaintiff’s second motion in limine to preclude or substantially limit the testimony of Kevin Galbreath, a “Transportation Safety Specialist” who was disclosed as an expert witness by defendants GERARDO

RODRIGUEZ and VOLPE DEDICATED, INC. (“Rodriguez” and “Volpe,” respectively, and collectively the “Volpe Defendants”) on September 20, 2013. A copy of the Volpe Defendants’ Notice of Exchange is annexed hereto as Exhibit “1”.

3. Galbreath was previously exchanged as an expert by defendant RITE AID HEADQUARTERS CORP. (hereinafter “Rite Aid”) on August 9, 2013. A copy of Rite Aid’s August 9, 2013 Notice of Exchange is annexed hereto as Exhibit “2”.

4. Copies of Galbreath’s *Curriculum Vitae* and report as exchanged by Rite Aid are annexed hereto at Exhibits “3” and “4” respectively.

5. The Volpe Defendants’ Notice of Exchange incorporated the report prepared by Mr. Galbreath and previously exchanged by Rite Aid as an exhibit, presumably to preserve their trial counsel’s right to inquire into his opinions at the trial of this matter.

6. However, the Volpe Defendants’ Notice of Exchange also stated that Galbreath would testify “in conformity with... the three simulations of this incident that Mr. Robert Miller prepared.” Ex. “1” at 2. Rite Aid’s Notice of Exchange had contained no such notice.

7. A computer disc containing Miller’s computer-generated simulations is annexed hereto at Exhibit “5”. A copy of Miller’s report is annexed hereto at Exhibit “6”.

8. Clearly, the Volpe Defendants are attempting to expand the scope of their inquiry to incorporate Galbreath’s “opinions” regarding Miller’s work so they may use Miller’s simulations – which are really just his animated versions of the testimony of the parties and an eyewitness – as exhibits and/or evidence at trial in case this Court grants plaintiff’s pending motion to preclude those portions of Miller’s opinion testimony based on the animations.

9. The Volpe Defendants did not make their intent to do so known to my firm until 5:11 pm Eastern Standard Time on September 20, 2013, when their trial counsel, Stephen M.

Knudsen, Esq. of Durkin & Durkin, LLP, e-mailed an electronic copy of their Notice of Exchange to counsel for all parties.

10. The Volpe Defendants' Notice of Exchange did not include a supplemental report by Galbreath containing a complete statement of his opinions regarding Mr. Miller's animations, how Galbreath arrived at those opinions, or how the opinions contained in Galbreath's original report were changed as a result of having viewed those animations.

11. At 6:01 pm Eastern Standard Time on September 20, 2013, my law clerk, Charles Travis Atkinson, replied to Mr. Knudsen's e-mail asking him if a supplemental report from Galbreath would be provided before midnight on that date, when the expert discovery period for this case was set to end. *See* Order of Judge P. Kevin Castel, ECF No. 26 (September 6, 2013). Mr. Atkinson further advised Mr. Knudsen that if a supplemental report was not provided by the expert discovery deadline, the Volpe Defendants' exchange would be deficient and rejected accordingly.

12. Mr. Knudsen responded at 6:19 pm Eastern Standard Time by replying, "Travis – do you ever go home? Have a good weekend!!" A copy of the complete exchange of e-mails referenced in this Declaration is annexed hereto at Exhibit "7".

13. Clearly, the Volpe Defendants do not possess a supplemental report authored by Galbreath, and never had any intention of producing one.

14. Mr. Knudsen's jocular disregard for this Court's Orders, the Federal Rules of Civil Procedure, and my law clerk's time (not to mention the Court's time) should be noted by this Court in ruling on the instant motion, especially when assessing the credibility of the defendants' opposition to it, if indeed any is forthcoming.

15. As discussed in the accompanying Memorandum of Law, the lack of a supplemental report from Galbreath giving a complete statement of his opinions regarding Miller's animations and how they affected the opinions contained in his earlier report warrants preclusion of his opinion testimony regarding those animations, including any attempt to introduce those animations as evidence through Mr. Miller.

Dated: New York, New York
September 21, 2013

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